85-894

NO._____

Supreme Court, U.S.
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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1985

O. L. McCOTTER,

Petitioner,

v.

EMMIT CHARLES LYONS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

WHETHER A STRATEGIC DECISION, MADE AFTER THOROUGH INVESTIGATION AND PREPARATION FOR TRIAL, CAN CONSTITUTE THE BASIS FOR HOLDING THAT COUNSEL'S REPRESENTATION FELL BELOW THAT GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The petitioner[1] respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on September 13, 1985.

OPINION BELOW

The panel opinion of the court of appeals is attached hereto as Appendix D.

1. For clarity, petitioner in this Court and respondent below, O. L. McCotter, Director of the Texas Department of Corrections, will be referred to as the state, the real party in interest. Respondent in this Court and petitioner below, Emmitt Charles Lyons, will be referred to as Lyons.

CONSTITUTIONAL PROVISIONS INVOLVED

The sixth amendment to the United States Constitution provides in pertinent part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

The state has lawful custody of Lyons pursuant to a judgment and sentence of the 86th Judicial District Court of Kaufman County, Texas, in Cause No. 13-987 styled *The State of Texas v. Emmitt Charles Lyons.* Lyons was charged with the offense of aggravated robbery, to which he entered a plea of not guilty. Lyons was tried by a jury, which on January 28, 1982, found him guilty of the offense charged and assessed punishment at imprisonment for forty (40) years. Lyons' conviction was affirmed by the Fifth Supreme Judicial Court of Appeals on August 15, 1983. **Lyons v. State**, No. 05-82-166-CR (Tex. Ct. App.—Dallas, Aug. 15, 1983). Lyons has filed two applications for state writ of habeas corpus challenging this conviction, and they were denied by the Texas Court of Criminal Appeals on July 4, 1982 and December 1, 1983. *Ex parte Lyons*, Application No. 11,663.

On February 7, 1984, Lyons filed the instant action in the United States District Court for the Northern District of Texas, Dallas Division. *Lyons v. McKaskle*, No. CA3-84-189-F. On November 13, 1984, the court adopted the findings, conclusion and recommendation of the magistrate and granted the writ, finding that Lyons was denied the effective assistance of counsel and directing the State to retry or release Lyons within 120 days. *See* Appendices, B, C. The State then appealed to the United States Court of Appeals for the Fifth Circuit, and on September 13, 1985, that court affirmed the judgment of the district court. *See* Appendix D.

B. Statement of Facts

The complainant, Shelba Jean Holloway, positively and unequivocally identified Lyons as the man who entered the FasGas in Terrell, Texas on August 31, 1981, at about 2:30 p.m., approached the counter, pulled a gun, and demanded the cash from the register ($100.00) and the cash from Ms. Holloway's purse ($125.00) (SF Vol. III 2-35).[2] While Ms. Holloway was restocking cigarettes, she observed Lyons enter through the front door. He approached the counter and asked for a carton of cigarettes, and gave her a twenty dollar bill. After receiving the cigarettes, he pulled out a gun and demanded that Holloway put the money and the cigarettes in a sack, which she did (SF III 4-7). Lyons then ordered her into the closet, where she remained until she heard the door open (SF III 8-9). The complainant gave the police a general description of the robber: black, medium complexion, about 6 feet 1 inch, 190-200 pounds and dressed in maroon pants and a gray patterned shirt (SF III 10-11). She testified that the store was well lighted, that her focus was directed at Lyons, and that she was able to observe him from two feet away with both full face and side view for about five minutes (SF III 16-17). She also was able to look out the window and observe Lyons fleeing (SF 10-21).

In cross-examination of the complainant, defense counsel established that the day after the robbery she was shown a photographic lineup and was unable to identify the robber and the following day, she was shown a photographic lineup from which she identified Petitioner (SF III 22). Then, in an attempt to impeach her identification of Lyons as the robber, counsel confronted the witness with the photos she was shown at the second lineup and established that the only photo which bore the word "Texas" and a six-digit number was that of Lyons (SF III 23-25). Despite defense counsel's attempts to shake the witness's identification, she remained steadfast in her assertion that she had been robbed by Lyons (SF III 30-31, 34).

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2. "SF" refers to the statement of facts of Lyons' trial. The Roman numeral refers to the volume and the Arabic numbers to the pages. "ROA" refers to the record on appeal.

The State's case-in-chief consisted entirely of the testimony of Ms. Holloway. After the State rested, defense counsel moved for an instructed verdict, which was denied. The defense then presented the testimony of a dozen witnesses in an attempt to establish mistaken identity and an alibi defense. Police Sergeant Don Echols was questioned by the defense regarding the photographic displays he showed to Ms. Holloway, including the fact that Lyons' photo was the only one to include the word "Texas" and a six-digit number (SF III 49-50). Echols was questioned as to where he obtained the photograph of Lyons, and he replied, "from his parole officer" (SF III 51).

After defense counsel concluded his examination of Echols, the jury was retired, and the following took place:

> MR. DANISH: I am going to make a standard objection at this point, your Honor.
>
> The witness brought out—I don't know if the witness was advised as to the Motion in Limine that had been filed. The District Attorney indicated that he did advise the witness. He brought it out as part of that report and I did not choose to proceed further with that nor do I think that the elements of what that record is had been opened.
>
> It may be that the previous record is in, which I have no objection to being in, but I do object if the Court allows the State to then go in and explore what that record is. It is obvious it is going to be prejudicial to the Defendant and goes against all Constitutional guarantees of due process, and at this point we are going to take stringent objection to it and let the Court allow what it sees fit.
>
> THE COURT: You may make your objection again for the record when it is asked.

(SF III 52-53).

Immediately thereafter, on cross-examination, the prosecutor established that Lyons previously had been convicted of

robbery and sentenced to a term of imprisonment and currently was on parole (SF III 54). On redirect, defense counsel resumed his attack on the reliability of Holloway's identification of Lyons, establishing through Echols that the photo of Lyons was a Texas Department of Corrections (TDC) mug shot and that Echols deliberately decided not to cover the TDC number prior to displaying the photo to Holloway (SF III 55-56).

Following further examination of Echols by both parties, the court recessed, and defense counsel made the following motion:

> MR. DANISH: At this time the Defense would again urge its objection to all the reading of the supplemental report with reference to the Defendant's conviction for robbery. We feel that this has so prejudiced this case that we would move for a mistrial.
>
> THE COURT: Overruled.

(SF III 63). The defense then presented the testimony of eleven witnesses in support of the defensive theory of alibi.

During closing argument at the guilt-innocence phase of the trial, the prosecutor made the following statement:

> You heard Don Echols say that this man had been convicted before of robbery. You look at Defendant's Exhibit 9, and there's a question on there asking if he has ever been convicted of anything. "Yes. Convicted of aggravated robbery; made parole". He's done it once.

(SF III 179).

The thrust of defense counsel's closing argument was that the cumulative testimony of Lyons' eleven alibi witnesses was more probative than that of the State's only witness, Ms. Holloway. An essential component of this line of argument was an attack on the reliability of the photographic lineup and Holloway's identification of Lyons. During his argument, counsel made the strategic choice to briefly refer to Lyons' prior criminal record:

> At the outset I want to comment on the fact that my client did not testify in this matter. You saw all the type of arguments that the District Attorney used. My client has been in the penitentiary before. He has been convicted. He carries a permanent brand with him for the rest of his life. Every time he walks into the courtroom and tries to say something, that will be brought up. Because of that conviction and because of that brand, very little weight can be placed on what Emmitt Lyons says. If Emmitt Lyons is found innocent, it will have to be based on the credibility and the weight you will give other people who have testifed in this case.

(SF III 182).

> On this identification his is the only picture that has the Texas Department of Corrections number marked across his chest. The brand of conviction once again.

(SF III 184).

SUMMARY OF ARGUMENT

There are special and important reasons to review this case. In holding counsel ineffective on the basis of a strategic decision made after thorough investigation and preparation, the Fifth Circuit contravened the rule of *Strickland v. Washington*, 466 U.S. ____, 104 S.Ct. 2052, 2066 (1984) that such tactical choices are "virtually unchallengeable."

Lyons was not denied the effective assistance of counsel. The court below erred in finding counsel's representation constitutionally deficient solely on the basis of a tactical decision which did not prove as efficacious as was hoped. It is clear from the entire record of this case that counsel's defensive strategy was to cast doubt on the credibility of the state's only eyewitness testimony by offering alibi witnesses in contradiction of her testimony and by attempting to impeach her identification of Lyons. In order to undermine the reliability of her identification,

counsel made the strategic choice to challenge the photographic lineup from which she identified Lyons; as part of this strategy, he necessarily revealed that Lyons previously had been incarcerated in the Texas Department of Corrections. This was reasonable trial strategy. Subsequently, when the prosecutor elicited the details of Lyons' prior conviction before the jury, counsel made the strategic decision not to object, thereby not calling undue attention to this statement. Counsel's conduct of Lyons' defense was reasonable in light of the circumstances which he faced, and the court below erred in holding that a tactical choice which backfired rendered counsel's representation constitutionally inadequate.

ARGUMENTS AND AUTHORITIES

I.

THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT.

In *Strickland v. Washington*, 466 U.S. ____, 104 S.Ct. 2052 (1984), this Court enunciated the proper standard for evaluating alleged deprivations of the sixth amendment right to counsel. The Court specifically held that "strategic choices made after thorough investigation of law and facts are virtually unchallengeable . . ." *Id.* at ____, 104 S.Ct. at 2066. The extent to which such tactical decisions may form the basis for finding counsel ineffective has not been delineated. In the instant case, the Fifth Circuit's finding of a sixth amendment violation appears to conflict with *Strickland*. A decision by this Court clarifying this issue would provide much needed guidance to the courts of appeals.

II.

COUNSEL'S STRATEGIC DECISION, MADE AFTER THOROUGH INVESTIGATION AND PREPARATION, WAS NOT SO ILL-CHOSEN THAT IT RENDERED LYONS' TRIAL FUNDAMENTALLY UNFAIR.

In order to prevail on his Sixth Amendment claim a habeas petitioner must prove two things.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, ____U.S.____, 104 S.Ct. 2052, 2064 (1984).

The proper analysis for determining the merits of an alleged Sixth Amendment violation "must be highly deferential." *Id.* at ____, 104 S.Ct. at 2065, and "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."

Id. at ____, 104 S.Ct. at 2066.

In the instant case, the court below failed to accord counsel's strategic decison the strong presumption of competence mandated by *Strickland*. The defensive theory was that of alibi and mistaken identification, and its presentation was two-fold. First, counsel presented eleven alibi witnesses to counter the complainant's eyewitness testimony; this action quite properly led the federal district court below to conclude that '[i]t is apparent from the record that the attorney made a detailed investigation in an effort to provide [Lyons] with an alibi defense" (ROA 39). This cohesive strategy was further carried out in closing argument, when defense counsel repeatedly stressed that the cumulative testimony of the defense witnesses outweighed that of the prosecution's only witness, Ms. Holloway (SF 182-83).

As the second part of Lyons' defense, counsel attempted to impeach Holloway's identification of Lyons. In so doing, he

hammered at the accuracy of her observations at the time of the offense and also cross-examined both her and Officer Echols at length as to the photographic lineup from which she identified Lyons. The basis of counsel's attack on the photo display was that Lyons' photo was the only one to bear the word "Texas" and a six-digit number. Defense counsel attempted to show not only that the lineup was unduly suggestive, but also that Officer Echols had unfairly focused his attention on Lyons by obtaining his photograph from a different source than the others used in the display:

> Q How did you manage to get that photograph? You didn't have that particular photgraph on file, did you?
>
> A No, sir. I got it from his parole officer.

(SF III 51). It was only at this juncture that defense counsel's strategy began to have an arguably adverse effect on the defense. This single unresponsive answer to counsel's question did not render his performance constitutionally inadequate, however, as the district court below correctly found:

> The peril-fraught attempt to impeach the victim's identification of Petitioner cannot be said to have been a trial tactic so ill-chosen as to have permeated the entire trial with obvious unfairness *e.g. Garland v. Maggio,* 717 F.2d 199, 206 (5th Cir. 1983). Nor do the perhaps ill-advised questions made in the heat of trial which elicited from Mr. Echols the fact that the Petitioner had a prior record, that he was on parole and that an informant had identified the Petitioner as the robber of the FasGas station give rise to a finding of ineffective assistance of counsel.

(ROA 40) (footnote omitted).

Both federal district court and the Fifth Circuit erred, however, in holding counsel ineffective for failing to object to the prosecutor's questions which brought out the details of the prior conviction. In so doing, these courts ignored *Strickland's* admonition that:

> a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. at ____, 104 S.Ct. at 2065-66, *citing Michel v. New York*, 350 U.S. 91, 101, 76 S.Ct. 158, 164 (1955). Inasmuch as it is undisputed that counsel's investigation and preparation were adequate, the sole basis for finding him ineffective is his tactical decision not to object. As *Strickland* teaches, "strategic choices made after thorough investigation of law and facts relevant to plausible options *are virtually unchallengeable* . . ." *Id.* at ____, 104 S.Ct. at 2066 (emphasis added).

Here, there is simply no basis for disregarding the presumption of competence. Because counsel already had objected to this line of questioning outside the presence of the jury, he obviously was aware that such an objection might be proper. Thus, his failure to object in the jury's presence can only be construed as the sort of tactical decision immune from attack under *Strickland.*

CONCLUSION

For these reasons, Petitioner prays that the petition for certiorari to the United States Court of Appeals for the Fifth Circuit issue.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EMMIT CHARLES LYONS	)	
	)	
VS.	)	**CA3-84-189-F**
	)	
ACTING DIRECTOR,	)	
TEXAS DEPARTMENT	)	
OF CORRECTIONS	)	

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE

Pursuant to the provisions of 28 U.S.C. §636(b), and an Order of the Court in implementation thereof, the subject cause has previously been referred to the United States Magistrate. The findings, conclusions and recommendation of the Magistrate, as evidenced by his signature thereto, are as follows:

FINDINGS AND CONCLUSIONS:

Type Case: This is a petition for habeas corpus relief filed by a State inmate pursuant to 28 U.S.C. §2254.

Parties: The Petitioner is confined at the Ramsey I Unit of the Texas Department of Corrections at Rosharon, Texas, serving a felony conviction for the offense of aggravated robbery.

The Respondent is the Acting Director of the Texas Department of Corrections.

Statement of the Case: Upon his plea of not guilty to the offense of aggravated robbery as charged in the indictment returned in Cause No. 13,987 the Petitioner was tried by a jury which returned a verdict of guilty. Thereafter punishment was assessed by the trial court at a term of imprisonment of 40 years. The Petitioner effected a direct appeal from his conviction, and the Court of Appeals, Fifth Supreme Judicial District

of Texas at Dallas, affirmed the conviction in an opinion delivered on May 13, 1983. *Lyons v. State*, No. 05-82-166-CR. The Petitioner has also filed two applications for habeas corpus relief pursuant to Article 11.07, Texas Code of Criminal Procedure. These applications were denied by the Texas Court of Criminal Appeals on July 4, 1982, and December 1, 1983, respectively.

In his present petition the following grounds for relief are presented.

1. The evidence presented by the State was insufficient to sustain the jury's verdict of guilty because it was based upon the identification of the Petitioner which resulted from impermissibly suggestive pre-trial identification procedures.

2. The Petitioner was denied effective assistance of counsel by his trial attorney.

In response to this court's Show Cause Order and the petition the Respondent has filed certified copies of the Petitioner's prior State proceedings together with his Answer, Motion for Summary Judgment and Brief. It is not claimed that the Petitioner has failed to exhaust available State remedies, and accordingly the petition is before the court for merits review.

Findings and Conclusions: Although his first ground for relief is premised upon a claim of insufficiency of the evidence, it appears that the substantive basis for the Petitioner's first ground is his claim that the in-court identification effected by the victim-witness Shelba Holloway should have been suppressed.

Construing his first ground as an attack upon the sufficiency of the evidence, it is abundantly clear that the prosecution presented sufficient evidence in its case-in-chief to permit a rational trier of fact to find the Petitioner guilty beyond a reasonable doubt of the offense of aggravated robbery. The evidence adduced through Ms. Holloway consisted of her in-court identification of the Petitioner as being the person who robbed her at gunpoint at her place of employment, the FasGas service station at Terrell, Texas, on August 31, 1981, at approximately 2:30 P.M. Ms. Holloway's testimony further

established that the Petitioner not only took money from the service station cash register, but also took $125.00 from Ms. Holloway's purse as well (See Statement of Facts, Volume III of 4 volumes, at pages 6-8).

It appears that the primary basis for the Petitioner's first ground is his claim that Ms. Holloway's in-court identification should have been suppressed. Pursuant to the Petitioner's pre-trial motion a hearing was held before the trial judge with reference to the admissibility of Ms. Holloway's in-court identification of the Petitioner (S.O.F., Pre-trial hearing, pages 12-64). After considering the testimony of the victim-witness, and that of two police officers who participated in the identification procedures from which Ms. Holloway identified the Petitioner, the trial court found by clear and convincing evidence that the pre-trial identification was neither tainted, influenced nor suggestive (Id, page 64).

The factual findings made by the State court are entitled to a presumption of correctness under §2254(d). *Sumner v. Mata*, 449 U.S. 539 (1981). Although the specific findings of fact are very brief, this court must give appropriate deference to implicit findings of the State court on credibility decisions when the State court has conducted a hearing on the issue at hand. *Marshall v. Lonberger*, ____U.S.____, 103 S.Ct. 843, 850-51 (1983). A review of the photographs presented to the witness (See footnote 1, *infra*) and the evidence presented at the suppression hearing demonstrate factual support in the record for the State court's finding. Further, the testimony elicited establishes that the identification made by Ms. Holloway was reliable under recognized criteria, even if it be assumed *arguendo* that the photographic spread was impermissibly suggestive. See *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972). The Petitioner's first ground is without merit and should be denied.

Prior to a consideration of the merits of the Petitioner's claim that his trial attorney failed to render constitutionally sufficient assistance of counsel, it is appropriate to consider the evidence which was adduced in the guilt-innocence portion of his criminal trial, since counsel's conduct must be viewed in its totality. *United States v. Gray*, 564 F.2d 885 (5th Cir. 1978)

cert. den. 98 S.Ct. 1587. (See Statement of Facts, Volume III of 4 Volumes).[1]

The prosecution relied solely upon the testimony of Ms. Shelba Holloway in its case-in-chief.

In defending the case the Petitioner first called Don R. Echols, a Terrell Police Department Detective Sgt., who previously testified in the suppression hearing (See No. 13,987, S.O.F. Pre-trial Hearing) wherein it was disclosed that only the Petitioner's picture in the photographic spread had numbers across the subject's chest. (See Defendant's Exhibit 1). The apparent purpose of this question was to suggest that this factor influenced Ms. Holloway's selection of the Petitioner's photograph from the spread (See Defendant's Exhibit 1 through 6).[2] During counsel's examination of Mr. Echols, he referred to other pictures displayed to Ms. Holloway as mug shots (e.g. S.O.F., Volume III, page 46, 51). In other parts of the officer examination counsel established that the witness was familiar with the Petitioner's prior criminal record and that the witness obtained the Petitioner's picture (Defendant's Exhibit 1) from his parole officer (Id, pages 50-51). The existence of the Petitioner's past criminal record was also elicited from Det. Echols with reference to an offense report (ID. page 47).

Following this direct examination, Petitioner's counsel in the jury's absence made an objection to any attempt by the prosecutor to elicit the specifics of the Petitioner's criminal record (Id, page 52-53). The trial judge did not rule on the objection, but directed counsel to reurge the objection when the question was asked (Id, page 53). When the prosecutor posed the question, Echols testified without objection that the Petitioner had previously been convicted for robbery (Id, page 54). After Petitioner's counsel elicited from the witness that he had received an anonymous tip that the Petitioner was the robber (Id, page 53) and after Echols has been excused as a witness, Petitioner's

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1. The exhibits admitted into evidence are found at the back of No. 13,987, Statement of Facts, Volume IV of 4 Volumes.

2. Ms. Holloway testified at both the pre-trial hearing and in the jury's presence that the numbers meant nothing to her (See S.O.F., Pre-trial Hearing, page 29-30, S.O.F., Volume III, page 25).

counsel moved for a mistrial, which was overruled by the trial court (Id, page 61).

The remaining witnesses called by the Petitioner were called to establish an alibi defense and in part to undermine the victim-witness's description of the Petitioner's clothing at the time of the robbery. The testimony generally established that the Petitioner has been at the offices of the Texas Employment Commission and the Terrell State Hospital, both at Terrell, Texas, on the morning and early afternoon of the robbery of the FasGas service station at Terrell on August 31, 1981.

In direct contradiction to Ms. Holloway's testimony that the Petitioner had robbed her at gunpoint at 2:30 P.M., the Petitioner called Janet White and Jimmy Oliver, both of whom testified to the Petitioner's presence at the Kennedy Heights Apartments in Terrell, Texas, between two and three o'clock.

In rebuttal the State called Brenda Shifflett to rebut the testimony offered by the Petitioner that he did not arrive at the T.E.C. office until after 11 A.M. Janet White was also recalled to establish that she had previously been convicted of a misdemeanor offense involving moral turpitude.

In the argument portion of the trial the prosecutor called to the jury's attention that the Petitioner had already been convicted once for the offense for which he was being tried (Id, page 179) and Petitioner's counsel alluded to the Petitioner's prior criminal record in two instances (Id, page 182, 184).

As his first basis for attacking his counsel's representation, the Petitioner complains that he cited incorrect Texas case authority in support of the Petitioner's Motion for Instructed Verdict (Id, page 35-36). Assuming without deciding that counsel's ground for the motion was based upon incorrect statements of then existing State law, the Petitioner has the further burden of establishing that he was prejudiced by his attorney's error. *Diagre v. Maggio*, 705 F.2d 786 (5th Cir. 1983); *Boyde v. Estelle*, 661 F.2d 388 (5th Cir. 1981). For the reasons stated above with reference to the Petitioner's first ground for relief, the evidence adduced by the prosecution in its case-in-chief was more than sufficient to withstand a motion for

instructed verdict to the charge alleged in the indictment. Accordingly the Petitioner's first claim against his trial counsel does not entitled him to habeas relief.

The remainder of the Petitioner's second ground pertains to counsel's conduct in the prosecution of his defense. It is apparent from the record that the attoney made a detailed investigation in an effort to provide the Petitioner with an alibi defense. Notwithstanding this investigation, the attorney's questioning of Mr. Echols severely eroded the efficacy of the Petitioner's defense.

In attempting to make his case to the jury that the victim-witness's identification was tainted by the photo spread, counsel chose a perilous route which required that the photographs be presented in evidence (Defendant's Exhibits 1 through 6). It is obvious that all of the photographs were taken by law enforcement agencies, and that the persons represented were arrestees at the time they were made, but the photographs themselves do not indicate whether any of the persons were ever convicted of criminal offenses. However, any ambiguity as to the final disposition of the Petitioner's prior contact with the criminal judicial process was dispelled when counsel elicited from the witness that he had obtained the Petitioner's photograph (Defendant's Exhibit 1) from his parole officer (Id, page 51). In addition, counsel elicited from the witness that the offense report of September 8, 1981, contained the Petitioner's criminal record (Id, page 47). If any lingering doubts remained in the minds of the jury as to the Petitioner's prior criminal conduct, they were completely removed when the witness answered the prosecutor's questions on cross-examination, to which no objection was made, that the Petitioner had previously been convicted of robbery, the same offense for which he was standing trial (Id, page 54).

In assessing the constitutional sufficiency of representation it is well settled that a criminal defendant is not entitled to error free counsel nor may an attorney's conduct be gauged by hindsight.

The peril-fraught attempt to impeach the victim's identification of the Petitioner cannot be said to have been a trial tactic

so ill-chosen as to have permeated the entire trial with obvious unfairness, e.g. *Garland v. Maggio*, 717 F.2d 199, 206 (5th Cir. 1983). Nor do the perhaps ill-advised questions made in the heat of trial which elicited from Mr. Echols the fact that the Petitioner had a prior record, that he was on parole and that an informant had identified the Petitioner as the robber of the FasGas station give rise to a finding of ineffective assistance of counsel.[3]

This court recognizes that counsel was perhaps put to a Hobson's choice when the trial court decuned to rule on his objection to testimony concerning the Petitioner's prior conviction make outside the jury's presence (Id, page 52-53,. However, this cannot excuse counsel's failure to have made an objection at the time the question was propounded sufficient to preserve it for appellate review[4], or to have requested a limiting instruction to the use which the jury could make of this evidence.[5]

No request for a limiting instruction concerning the Petitioner's prior conviction was ever made by his attorney. Finally, as noted above, the prosecutor referred to the Petitioner's conviction in his closing argument (Id, page 179) without any objection from the Petitioner. Indeed the attorney referred to the

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3. Petitioner's counsel's repeated use of the terms "mug book" and "mug shots" in his questioning of Ms. Holloway and Mr. Echols, does not, standing alone, establish ineffecitve assistance of counsel.

4. In his direct appeals brief Petitioner's appellate attorney, being appointed after Petitioner's trial, conceded that no objection had been made (See Brief of Appellant, Appeal No. 05-83-00166-Cr, Ground of Error No. 2, at page 7; Ground of Error No. 3 at pages 10-11; Ground of Error No. 6, pages 21-22).

5. The sole basis for the admission of Petitioner's prior conviction was the fact that it had been opened during the Petitioner's direct examination of Mr. Echols. The Petitioner did not testify, nor was his prior conviction probative of any issue raised by the evidence. Its admission was extremely prejudicial which became all the more pronounced by the absence of any limiting instruction. Under the circumstances presented, the trial court may have been required to act *sua sponte* to insure that the Petitioner's Fourteenth Amendment due process rights were protected. e.g. *Fitzgerald v. Estelle* 505 F.2d 1334, 1337-1338 (*en banc*) (5th Cir. 1975).

conviction on two occasions when arguing the Petitioner's case to the jury.

The evidence against the Petitioner was hardly overwhelming. The State's entire case-in-chief relief upon the in-court identification of the Petitioner by the victim of the robbery. While her testimony, at both the pre-trial hearing and the trial itself, was strong and unequivocal, it is also clear that the testimony of the Petitioner's witnesses Oliver and White, if believed, provided him with an unassailable alibi. It is further observed that the jury's deliberations extended over a two-day period before their verdict was returned (Id, pages 198-199).

In considering the specific conduct of Petitioner's counsel raised in his petition with reference to presentment of the Petitioner's defense, and viewed in the totality of counsel's representation, it is clear that the attorney's representation fell short of the minimum standards imposed by the Sixth Amendment, and that the Petition has demonstrated actual prejudice arising from counsel's deficient representation. Therefore, the Petitioner is entitled to conditional habeas corpus relief.

RECOMMENDATION:

For the foregoing reasons it is recommended that Petitioner's application for writ of habeas corpus be granted unless within a specified period of time the State retry the Petitioner in Cause No. 13,987.

/s/

UNITED STATES MAGISTRATE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EMMIT CHARLES LYONS	)	
	)	
VS.	)	**CA3-84-189-F**
	)	
ACTING DIRECTOR, TDC	)	

ORDER

After making an independent review of the pleadings, files and records in this case, and the findings, conclusions and recommendation of the United States Magistrate, I am of the opinion that the findings and conclusions of the Magistrate are correct and the are adopted as the findings and conclusions of the Court.

IT IS, THEREFORE, ORDERED that the Findings, Conclusions and Recommendation of the United States Magistrate are adopted.

SIGNED AND ENTERED this 13th day of November, 1984.

/s/

UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EMMIT CHARLES LYONS	)	
	)	
VS.	)	**CA3-84-189-F**
	)	
ACTING DIRECTOR,	)	
TEXAS DEPARTMENT	)	
OF CORRECTIONS	)	

JUDGMENT

This action came on for consideration before the Court, and the issues having been duly considered and a decision duly rendered,

IT IS, THEREFORE, ORDERED AND ADJUDGED that:

1. One hundred and twenty (120) days after date of entry of this Judgment all charges against Petitioner arising out of Indictment No. 13,987 shall be dismissed and Petitioner shall be released from the criminal charges in said indictment unless within such one hundred and twenty (120) day period, or within such additional time as may be fixed pursuant to paragraph two herein, the State of Texas shall proceed to retry Petitioner in said cause.

2. On written motion filed herein within the one hundred and twenty (120) day period and upon a showing of good cause for doing so, the one hundred and twenty (120) day period fixed in paragraph one hereinabove may be extended by order of this Court.

IT IS FURTHER ORDERED that the Clerk of the court shall transmit a true copy of this Judgment, together with a true copy of the order adopting the Findings, Conclusions and Recommendation of the United States Magistrate to Petitioner and Respondent.

ENTERED this 13th day of November, 1984.

/s/

UNITED STATES DISTRICT JUDGE

APPENDIX D

Emmit Charles LYONS,
Petitioner-Appellee,

v.

O.L. McCOTTER, Director, Texas Department of Corrections,
Respondent-Appellant.

No. 84-1992.

United States Court of Appeals,
Fifth Circuit.

Sept. 13, 1985.

Petitioner filed application for writ of habeas corpus, alleging he was denied effective assistance of counsel in his state trial for aggravated robbery with a deadly weapon when counsel failed to object or request limiting instruction to cross-examination testimony indicating that he had previously been convicted of a similar offense. The United States District Court for the Northern District of Texas, Robert W. Porter, J., adopted the magistrate's findings, conclusions, and recommendation and granted habeas relief. Director of Texas Department of Corrections appealed. The Court of Appeals, Robert Madden Hill, Circuit Judge, held that failure of defense counsel to exclude or in any way limit cross-examination testimony indicating that defendant had been previously convicted of aggravated robbery constituted ineffective assistance of counsel, in that details of defendant's prior conviction would most surely have been excluded under Texas Law, fact that defendant previously had been convicted of the same crime with which he was charged was highly prejudicial, and lack of any limiting instruction enabled prosecutor in his closing argument to refer to defendant's prior conviction.

Affirmed.

1. Criminal Law — 1166.11(5)

Prejudice required to be shown to reverse a conviction for ineffective assistance of trial counsel is something considerably more than possibility that unreasonable error by counsel might have had some effect on trial; instead, defendant must show there is reasonable probability that, but for counsel's unprofessional errors, results of proceeding would have been different. U.S.C.A, Const.Amend. 6.

2. Criminal Law — 641.13(6)

Decision of trial counsel to elicit testimony during direct testimony of detective that defendant had previously been convicted, in an attempt to show that witness had identified defendant not because he was the robber but because his photograph suggested, more than the others, that he was the robber, was a strategic, albeit inane, trial tactic that did not constitute ineffective assistance of counsel. U.S.C.A. Const. Amend. 6.

3. Criminal Law — 641.13(6)

In state prosecution for aggravated robbery with a deadly weapon, failure of defense counsel to exclude or in any way limit corss-examination testimony indicating that defendant had been previously convicted of aggravated robbery constituted ineffective assistance of counsel, in that details of defendant's prior conviction would most surely have been excluded under Texas law, fact that defendant previously had been convicted of the same crime with which he was charged was highly prejudicial, and lack of any limiting instruction enabled prosecutor in his closing argument to refer to defendant's prior conviction. U.S.C.A. Const.Amend. 6.

4. Criminal Law — 641.13(6)

To pass over admission of prejudicial and arguably inadmissible evidence may be a strategic decision by trial counsel; to pass over admission of prejudicial and clearly inadmissible evidence has no strategic value and may constitute ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

Appeal from the United States District Court for the Northern District of Texas.

Before RANDALL, DAVIS, and HILL, Circuit Judges.

ROBERT MADDEN HILL, Circuit Judge:

The director of the Texas Department of Corrections (the director) appeals from the judgment of the district court which adopted the magistrate's findings, conclusions, and recommendation that the application for writ of habeas corpus of Emmit Charles Lyons, a state prisoner, should be granted and which directed the state of Texas to retry or release Lyons within 120 days of entry of the judgment. The district court reasoned that Lyons was denied effective assistance counsel in his trial for aggravated robbery with a deadly weapon when his counsel failed to object or request a limiting instruction to cross-examination testimony and closing argument indicating that Lyons had previously been convicted of a similar offense. The court found that the evidence against Lyons was "hardly overwhelming" and concluding that Lyons suffered actual prejudice from his counsel's failue to exclude or limit evidence of the prior conviction. Finding that counsel's failure to object or request a limiting instruction did not constitute reasonable professional assistance, we affirm the district court's judgment granting Lyons habeas relief.

I. Factual and Procedural Background

Lyons was indicted for the offense of aggravated robbery with a deadly weapon of an attendant at a FasGas Service Station in Terrell, Texas, on August 31, 1981. The State's case-in-chief relied entirely upon the eyewitness testimony of Shelba Jean Holloway, the attendant at the service station. Holloway testified unequivocably and positively at trial that while restocking cigarettes she observed Lyons enter through the front door, approach the counter, ask for a carton of cigarettes and give her a twenty-dollar bill; that after receiving the cigarettes, he pulled out a gun and demanded that Holloway put money and the cigarettes in a sack, which she did; and that Lyons then ordered her into the closet where she remained until she heard the front door open. She then telephoned the police and at the

same time observed Lyons fleeing the scene. Holloway gave the police a general description of the robber: black, medium complexion, about 6 feet 1 inch, 190-200 pounds and dressed in maroon pants and a gray patterned shirt. She testified that the store was well lit, that her focus was directed at Lyons, and that she was able to observe him from two feet away with both full face and side view for about five minutes.

The day after the robbery police officials showed Holloway several albums of pictures but she saw none that resembled the robber. Lyons' picture was not among those shown to Holloway at that time. The next day Holloway was shown six photographs from which she selected a photograph of Lyons and stated that the man represented in Lyons' photograph was the man who robbed her.[1] While several of these photographs including Lyons' appear to have been taken in a custodial setting—resembling a mug shot—only Lyons' photography displayed the word "Texas" and a number and date in front of his chest. Based upon Holloway's photographic line-up identification, Lyons was arrested and subsequently identified by Holloway in a personal line-up.

At his trial, after the state rested, Lyons' retained counsel, John Danish, moved for an instructed verdict, which was denied. Danish presented the testimony of a dozen witnesses in an attempt to establish the defenses of mistaken identity and alibi. The testimony of these witnesses generally established that Lyons had been at the offices of the Texas Employment Commission (TEC) and the Terrell State Hospital, both at Terrell, Texas, on the morning and early afternoon of August 31, 1981. Directly contradicting Holloway's testimony that Lyons had robbed her at gunpoint at 2:30 p.m. both Janet White and Jimmy Oliver testified that Lyons was present at the Kennedy Heights Apartments in Terrell, Texas, between two and three o'clock. The state then established that Oliver was a "good friend" of Lyons and also established that White previously had been convicted of a misdemeanor offense involvimg moral turpitude.

---

1. Upon receiving an anonymous tip that Lyons was the robber, detective Don Echols, who administered the photographic line-up, included a picture of Lyons obtained from Lyon's parole officer.

Danish also called as a witness detective Echols regarding the photographic line-up he showed to Holloway. Specifically, Danish elicited the fact that Lyons' photograph was the only one to include the word "Texas" and a six-digit number. As the district court observed, '[t]he apparent purpose of this question was to suggest that this factor influenced Ms. Holloway's selection of the Petitioner's photograph from the spread."[2] Danish also asked Echols where he obtained the photograph of Lyons, to which he replied, "from his parole officer."

After Danish concluded his examination of Echols, the jury retired and the following colloquy between counsel and the court occurred:

> MR. DANISH: I am going to make a standard objection at this point, your Honor.
>
> The witness brought out—I don't know if the witness was advised as to the Motion in Limine that had been filed.[3] The District Attorney indicated that he did advise the witness. He brought it out as part of that report and I did not choose to proceed further with that nor do I think that the elements of what that record is has been opened.
>
> It may be that the previous record is in, which I have no objection to being in, but I do object if the Court allows the State to then go in and explore what that record is. It is obvious it is going to be prejudicial to the Defendant and goes against all Constitutional guarantees of due process, and at this point we are going to take stringent objection to it and let the Court allow what it sees fit.

---

2. Holloway testified at both a pre-trial hearing relating to the photographic display and personal line-up and in the jury's presence that the numbers meant nothing to her.

3. The motion in limine sought to preclude the *prosecution* from mentioning or alluding to Lyons' prior conviction for the purpose of impeachment or as an extraneous offense until a hearing could be held outside the presence of the jury.

> THE COURT: You may make your objection again for the record when it is asked.

On cross-examination, the prosecutor questioned Echols about the details of Lyons' past criminal record. Echols testified, *without objection* from Danish, that Lyons had previously been convicted for robbery and subsequently paroled. After Echols had been excused as a witness and out of the presence of the jury, Danish moved for a mistrial stating "[d]efense would again urge its objection to all the reading of the supplemental report with reference to the Defendant's conviction for robbery. We feel this has so prejudiced this case that we would move for a mistrial." Without comment the district court overruled Danish's motion. During closing argument the prosecutor stated to the jury:

> You heard Don Echols say that this man had been convicted before of robbery. You look at Defendant's Exhibit 9, and there's a question on there asking if he has ever been convicted of anything. "Yes. Convicted of aggravated robbery; made parole." He's done it once.

Lyons' counsel again failed to object to this statement regarding Lyons' prior criminal record.

The jury found Lyons guilty of the offense of aggravated robbery with a deadly weapon and the district court then sentenced him to confinement in the state penitentiary for a term of forty years. Lyons effected a direct appeal from his conviction, and the Texas Court of Appeals affirmed the conviction. Lyons then filed two applications for state habeas corpus relief. These applications were denied by the Texas Court of Criminal Appeals.

Lyons thereafter filed this federal habeas corpus petition. He argued that the evidence presented by the state was insufficient to sustain the jury's verdict of guilty because it was based upon identification by Holloway which resulted from impermissibly suggestive pre-trial identification procedures and that he was denied effective assistance of counsel by his trial attorney. The district court, adopting the magistrate's findings,

concluded that the prosecution presented sufficient evidence to support a finding of guilt beyond a reasonable doubt. As to the second ground for relief, however, the court determined that Lyons' application should be granted. It concluded that Danish's failure to object to the introduction of Lyons' prior criminal record or to request a limiting instruction constituted ineffective assistance of counsel. The director then perfected this appeal as to only the issue of ineffective assistance of counsel.[4]

II. *Ineffective Assistance of Counsel*

In evaluating whether Lyons' conviction must be reversed because of ineffective assistance from his trial counsel, we utilize the two-part test set forth by the Supreme Court in *Strickland v. Washington*, ____U.S.____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

____U.S. at ____, 104 S.Ct. at 2064, 80 L.Ed.2d at 693.

---

4. The district court stayed its judgment—directing the state of Texas to retry or release Lyons within 120 days of entry of judgment—pending resolution of this appeal.

A. Prejudice

[1] The prejudice required by the second part of the *Strickland* test is something considerably more than the possibility that an unreasonable error by counsel might have had some effect on the trial. As the Court stated in *Strickland*: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at ____, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. The director, on appeal, does not challenge the district court's finding of actual prejudice. Accordingly, we proceed to examine the director's primary argument: that Danish's failure to object to introduction of the details of Lyons' prior record constituted permissible trial strategy rather than deficient performance falling below that guaranteed Lyons by the Sixth Amendment.[5]

B. Counsel's Effectiveness

We now turn to the first part of the *Strickland* test: whether the trial counsel's professional conduct was deficient. *Strickland* teaches that:

> Judicial scrutiny of counsel's performance must be highly deferential.... Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls

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5. Were we inclined to independently review the court's finding of prejudice, *see Armstead v. Maggio*, 720 F.2d 894, 896 (5th Cir. 1983), we would be convinced that Danish's failure to object resulted in actual prejudice to Lyons' defense. The prosecutor's case relied entirely upon Holloway's in-court identification of Lyons. Notwithstanding Holloway's unequivocal testimony at the pre-trial hearing and at trial identifying Lyons as the robber, we note that the state offered no corroborating evidence against Lyons; that Holloway's identification of Lyons may have been influenced, to some degree, by the pre-trial photographic line-up; and, most importantly, that two witnesses' testimony placed Lyons away from the location of the robbery during the time of the robbery. Even though one witness was characaterized as a "good friend" of Lyons and the other plead guilty to shoplifting, a misdemeanor involving moral turpitude, we conclude that the prosecutor's case was far from overwhelming and that the introduction into evidence of Lyons' prior aggravated robbery conviction undermined the reliability of his present conviction.

> within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. at _____ __ _____, 104 S.Ct. at 2065-66, 80 L.Ed.2d at 694-95. The director emphatically stresses the district court's failure to afford Danish's conduct sufficient deference and classifies Danish's failure to object in the jury's presence as a tactical decision presumptively made in the exercise of reasonable professional judgment. In scrutinizing the performance of counsel for Lyons in this case, we are mindful that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, ____U.S. at ____, 104 S.Ct. at 2064, 80 L.Ed.2d at 694. That judicial scrutiny of counsel's performance, or lack thereof, must be highly deferential is unassailable. Nevertheless, we are not blind to the equally unassailable fact that "the purpose of the effective assistance guarantee of the Sixth Amendment ... is simply to ensure that criminal defendants receive a fair trial." *Strickland*, ____U.S. at____, 104 S.Ct. at 2065, 80 L.Ed.2d at 694. Our review of Danish's performance leads us to conclude that it does not fall within "the wide range of reasonable professional assistance," *id.*, nor might it be considered "sound trial strategy." *Id.* 104 S.Ct. at 2066, 80 L.Ed.2d at 695.

[2] The director argues that Danish's decision—to elicit testimony that Lyons had previously been convicted—was a strategic decision "which *Strickland* classifies as 'virtually unchallengeable.' " Danish presumably felt it was necessary to tie the fact that Lyons' photograph in the photographic line-up bore the word "Texas" and a six-digit number to the fact that Lyons previously had been convicted, thus giving rise to the implication that Holloway identified Lyons' not because he was the robber but because his photograph suggested, more than the others, that he was the robber.[6] We agree, therefore, that

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6. Danish's efforts here may have been misguided. An examination of the six photographs appearing in the line-up reveals that besides Lyons'

(footnote continued on next page)

Danish's voluntary introduction of the existence of Lyons' criminal record was a strategic, albeit inane, trial tactic.

[3] Lyons, however, contends also that Danish failed to exclude or in any way limit cross-examination testimony indicating the criminal offense for which Lyons previously had been convicted. The director's answer to this contention is again one founded on trial strategy. The director asserts that "[B]ecause counsel [Danish] already had objected to this line of questioning outside the presence of the jury, he obviously was aware that such an objection might be proper. Thus, [the director argues, Danish's] failure to object in the jury's presence can only be construed as a tactical decision, as the court below correctly recognized." This is an incorrect reading of the district court's order. The court did find that Danish's introduction of Lyons' past record in an attempt to discredit Holloway's identification was a "trial tactic [not] so ill-chosen as to have permeated the entire trial with obvious unfairness." However, the court also found that Danish unreasonably failed to object to the prosecutor's questions as to the nature of the prior conviction, failed to object to the prosecutor's allusion in closing argument to Lyons' propensity to commit aggravated robbery in light of his prior conviction for a similar crime and failed to seek a limiting instruction as to the prior conviction at any time. Our examination of the trial record leads us to agree with the district court and conclude that Danish's failure to object at the proper time to the introduction of Lyons' prior conviction, or to seek to limit the use of such evidence, constituted constitutionally deficient assistance of counsel.

(footnote continued from previous page)

photograph, two others have been numbers and the word "Texas" albeit abbreviated as "TX" and that as the district court observed, "all of the photographs were taken by law enforcement agencies, and ... the persons represented were arrestees at the time they were made ...." Nevertheless, because "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time ...," *Strickland*, ____U.S. at____, 104 S.Ct. at 2065, 80 L.Ed.2d at 694, we do not believe Danish's introduction of evidence indicating Lyons had a criminal record constituted constituionally deficient performance.

BEST AVAILABL

Notwithstanding the state court's admonition to Danish to object when the state attempted, on cross-examination, to uncover the details of Lyons' past criminal record, Danish failed to do so. We can perceive no sound strategic reason for such a failure. There are two conceivable reasons for not objecting to admission of the details of the prior aggravated robbery conviction: first, to not draw undue attention to the prior conviction and, second, to preclude possible speculation by the jury as to the details of the prior conviction. In neither case might Danish's failure to object be considered sound trial strategy. *Strickland*, ____U.S. at____, 104 S.Ct. at 2066, 80 L.Ed.2d at 695.

[4] The first reason for not objecting is not sound since under Texas law the details of Lyons' prior conviction would most surely have been excluded. *See Chambers v. State*, 601 S.W.2d 360, 362 (Tex.Crim.App. 1980); *see also* Tex.R.Evid. 404(b). Thus, the details of the prior conviction would not have been drawn to the jury's attention had a timely objection been made. To pass over the admission of prejudicial and arguably inadmissible evidence may be strategic; to pass over the admission of prejudicial and clearly inadmissible evidence, as here, has no strategic value. The second reason for not objecting also is not sound since the worst possible speculation by the jury would be that which was introduced into evidence as a result of the lack of any objection by Danish: that Lyons previously had been convicted of aggravated robbery, the same crime with which he was charged. As we stated in *Nero v. Blackburn*, 597 F.2d 991 (5th Cir. 1979) (failure of defense counsel to request a mistrial), "[w]e can hardly imagine anything more prejudicial to Nero than allowing the jury in his armed robbery case to hear the prosecutor's comments that Nero had been convicted twice before of burglary and once on drug charges. The jury may well have convicted Nero of the charged offense because it was aware of his prior convictions." 597 F.2d at 994. Similarly, here there could be no strategic basis for allowing the jury to hear that Lyons previously had been convicted of the same offense for which he stood trial.

Our conclusion that Danish's assistance to Lyons was deficient is bolstered by the fact that no limiting instruction was requested. After officer Echols testified to the details of Lyons'

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prior conviction, Danish, with no prejudice to Lyons, could have requested that the jury be instructed to consider the prior conviction only for the purpose of determining whether the photographic identification was credible and not suggestive. While this instruction does not entirely foreclose possible misuse of such evidence by the jury, it does direct the jury in what manner it should interpret this highly prejudicial and incriminating evidence. Moreover, the lack of any limiting instruction enabled the prosecutor in his closing argument to the jury to refer to Lyons' prior aggravated robbery conviction: "You look at Defendant's Exhibit 9, and there'a a question on there asking if he has ever been convicted of anything. 'Yes. Convicted of aggravated robbery; made parole.' He's done it once." This argument implicitly, if not explicitly, suggested to the jury that Lyons had repeated his earlier offense of armed robbery.

The director's argument that Danish's failure to object was sound trial strategy hinges upon Danish's otherwise credible defense of Lyons and upon Danish's knowledge that an objection to introduction of the details of Lyons' prior conviction was called for. We cannot agree. The presumption that Danish's inaction falls within the wide range of reasonable professional assistance does not overweigh or preclude in any way the fact that in this particular case, an attorney, exercising reasonable professional judgment, would not fail to object to the introduction of the details of a prior aggravated robbery conviction when the defendant is accused of the same offense, nor would such an attorney fail to request an instruction limiting the use of this evidence by the jury. *See Vela v. Estelle,* 708 F.2d 954 (5th Cir.1983), *cert. denied,* ____U.S.____, 104 S.Ct. 736, 79 L.Ed.2d 195 (1984) (pre-*Strickland* decision in which we held that defense counsel who failed to specifically object, ask for a curative instruction, or preserve for appeal error as to prejudicial testimony, did not render reasonably effective assistance of counsel). The course of conduct undertaken by Danish may not be considered sound trial strategy. We conclude, therefore, that Danish's "omissions were outside the wide range of professionally competent assistance," *Strickland,* ____U.S. at ____, 104 S.Ct. at 2066, 80 L.Ed.2d at 695, and thus constituted ineffective assistance of counsel.

The judgment of the district court is AFFIRMED.

BEST A

APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
600 Camp Street
New Orleans, LA 70130
October 7, 1985

Mrs. Nancy H. Doherty, Clerk
U.S. District Court
Dallas, TX, 75242

No. 84 1992-LYONS -vs- McCotter.
(CA 3 84 189 "F")

☒ Enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

☐ Enclosed to you only is a certified copy of the Rule 47.6 Decision in the above case issued as and for the mandate.

☐ The Court having denied the motion for stay of mandate, enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

☐ Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

☐ We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

☒ copy of the Court's opinion.

AVAILABLE COPY

☐ Original record on appeal or review. (TO BE RETURNED LATER)

☐ Original exhibits. (TO BE RETURNED LATER)

☐ Bill of Costs approved by this Court. ☐ Copy enclosed to counsel.

cc: (Letter Only)
Hon. Robert W. Porter
Mr. Charles A. Palmer
Mr. Craig S. Lundquist

Sincerely,

Gilbert F. Ganucheau, Clerk

By:_____
Deputy Clerk

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

NO. 85-894

Supreme Court, U.S.
FILED
DEC 3 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1985

O. L. MCCOTTER,

Petitioner,

v.

EMMITT CHARLES LYONS,

Respondent,

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

Jon R. "Randy" Farrar*
Staff Attorney

Sharon Kutzschbach
Staff Attorney

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Texas Department of Corrections
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*Attorney of Record

QUESTION PRESENTED

WHETHER RESPONDENT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY HIS DEFENSE ATTORNEY'S FAILURE (1) TO OBJECT TO THE ADMISSION OF THE DETAILS OF A PRIOR AGGRAVATED ROBBERY CONVICTION, AND (2) TO ASK FOR A LIMITING INSTRUCTION.

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NO. 85-894

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1985

O. L. MCCOTTER,

Petitioner,

v.

EMMITT CHARLES LYONS,

Respondent,

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Emmitt Charles Lyons, Respondent, by and through his attorney, Jon R. "Randy" Farrar, and files this brief in response to O. L. McCotter's Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

The sixth amendment to the United States Constitution provides in pertinent part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Respondent is in the custody of the Texas Department of Corrections pursuant to a conviction from the 86th Judicial District Court of Kaufman County, Texas, in Cause No. 13,987 styled The State of Texas v. Emmitt Charles Lyons. Respondent was charged with the offense of aggravated robbery, to which he entered a plea of not guilty. Respondent was tried by a jury which, after two days of deliberation, found him guilty of the offense charged and assessed punishment at forty (40) years in the Texas Department of Corrections.

The Respondent effected a direct appeal from his conviction, and the Court of Appeals, Fifth Supreme Judicial District of Texas at Dallas, affirmed the conviction in an opinion delivered on May 13, 1983. Lyons v. State, No. 05-82-166-CR. The Respondent has also filed two applications for habeas corpus relief pursuant to Article 11.07, Texas Code of Criminal Procedure. These applications were denied by the Texas Court of Criminal Appeals on July 4, 1982, and December 1, 1983, respectively.

Thereafter, Respondent filed a Writ of Habeas Corpus, 28 U.S.C. §2254, with the United States District Court for the Northern District of Texas in Dallas on May 17, 1984, upon which Magistrate Sanderson recommended that relief be granted (Appendix A).[1] On November 13, 1984, the Court adopted the findings, conclusions and recommendations of the magistrate and granted the writ, finding that the Respondent was denied effective assistance of counsel (Appendix B). On September 13, 1985, the United States Court of Appeals for the Fifth Circuit affirmed the decision (Appendix D). Petitioner thereafter failed to timely request a stay of the mandate, and the Court of Appeals denied Petitioner's Motion to Recall the Issuance of the Mandate (Respondent's Appendix A).

B. Statement of Facts

The complainant, Shelba Jean Holloway, testified that while working at FasGas in Terrell, Texas on August 31, 1981, at approximately 2:30 p.m., she was robbed at gunpoint. The evidence adduced through Ms. Holloway consisted

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[1] Unless otherwise indicated, all citations to appendices refer to the appendices attached to Petitioner's Petition for Writ of Certiorari.

of her in-court identification of the Respondent as being the person who robbed her, and that he not only took money from the service station register, but also took $125.00 from Ms. Holloway's purse as well (See Statement of Facts, Volume III of 4 volumes, at pages 6-8). The prosecutor relied solely upon the testimony of Ms. Holloway in its case-in-chief.

In cross-examination of the complainant, defense counsel established that on the day after the robbery she was shown a photographic lineup and was unable to identify the robber. On the following day, she was again shown a photographic lineup from which she this time identified Respondent (SF III 22). In an attempt to impeach her identification of Respondent as the robber, counsel confronted the witness with the photos she was shown at the second lineup and established that the only photo which bore the word "Texas" and a six-digit number was that of Respondent (SF III 23-25). Despite defense counsel's attempt to discredit witness's identification, she remained steadfast in her belief she had been robbed by the Respondent (SF III 30-31, 34).

In defending the case, the Respondent first called Don R. Echols, a Terrell Police Department Detective, who previously testified in a suppression hearing (See No. 13,987, S.O.F. Pre-trial Hearing) wherein it was disclosed that only the Respondent's picture in the photographic spread had numbers across the subject's chest. The apparent purpose of this question was to suggest that this fact influenced Ms. Holloway's selection of the Respondent's photograph from the spread. During counsel's examination of Mr. Echols, he referred to other pictures displayed to Ms. Holloway as mug shots (e.g. S.O.F., Volume III, page 46,51). In other parts of the officer's examination, counsel established that the witness was familiar with the Respondent's prior criminal record and that the witness obtained the Respondent's picture from his parole officer (Id., pages 50-51). The existence of the Respondent's past criminal record was also elicited from Det. Echols with reference to an offense report (Id., page 47).

Following this direct examination, Respondent's counsel, in the jury's absence, made an objection to any attempt by the prosecutor to elicit the specifics of the respondent's criminal record (Id., pages 52-53). The trial

judge did not rule on the objection, but directed counsel to reurge the objection when the question was asked (Id., page 53). When the prosecutor posed the question, Echols testified without objection that the Respondent had previously been convicted for robbery (Id., page 54). After Respondent's counsel elicited from the witness that he had received an anonymous tip that the Respondent was the robber (Id., page 53) and after Echols had been excused as a witness, Respondent's counsel moved for a mistrial, which was overruled by the trial court (Id., page 61).

The remaining witnesses called by the Respondent were called to establish an alibi defense and in part to undermine the victim-witness's description of the Respondent's clothing at the time of the robbery. The testimony generally established that the Respondent had been at the offices of the Texas Employment Commission and the Terrell State Hospital, both at Terrell, Texas, on the morning and early afternoon of the robbery of the FasGas service station at Terrell on August 31, 1981.

In direct contradiction to Ms. Holloway's testimony that the Respondent had robbed her at gunpoint at 2:30 p.m., the Respondent called Janet White and Jimmy Oliver, both of whom testified to the Respondent's presence at the Kennedy Heights Apartments in Terrell, Texas between two and three o'clock.

In rebuttal, the State called Brenda Shifflett to rebut the testimony offered by the Respondent that he did not arrive at the T.E.C. office until after 11 a.m. Janet White was also recalled to establish that she had previously been convicted of a misdemeanor offense involving moral turpitude.

In the argument portion of the trial, the prosecutor, again without objection, called to the jury's attention that the Respondent had already been convicted once for the offense of aggravated robbery (Id., page 179) and alluded to the Respondent's prior criminal record in two instances (Id., pages 182, 184).

SUMMARY OF ARGUMENT

Respondent was denied the effective assistance of counsel. Notwithstanding his inadequate preparation for trial and lack of understanding of how to effectively develop trial tactics, the Respondent's trial attorney was ineffective primarily because he failed to protect the Respondent's right from being tried and convicted herein based upon his prior criminal record; more particularly:

1. For his failure to make an objection when the state delved into the Respondent's past criminal record and thereby preserve the objection for Appellate review;[2]
2. For his failure to request a limiting instruction on how the jury was to use the evidence of the Respondent's prior criminal record;
3. For his failure to request a limiting instruction concerning the Respondent's prior conviction at any time during the trial, particularly when the State twice referred to his prior conviction in closing arguments.

The Petitioner attempts to dismiss the Respondent's claims as being merely trial tactics, and that according to the rule of Strickland v. Washington, 466 U.S. ___, 104 S.Ct. 2052, 2066 (1984), such tactical choices are "virtually unchallengeable". The Petitioner asserts that the lower courts have erroneously granted relief based on tactical decisions. In characterizing the decisions of the lower court as such, the Petitioner has misread the opinions of the lower courts. Magistrate Sanderson indicated that the attempt to impeach the victim's identification was not in and of itself ineffectiveness:

> The peril-fraught attempt to impeach the victim's identification of the Petitioner cannot be said to have been a trial tactic so illchosen as to

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[2] In his direct appeal brief Respondent's appellate attorney, being appointed after Respondent's trial, conceded that no objection had been made (See Brief of Appellant, Appeal No. 05-83-00166-CR, Ground of Error No. 2, at page 7; Ground of Error No. 3 at pages 10-11; Ground of Error No. 6, pages 21-22).

have permeated the entire trial with obvious unfairness. e.g. Garland v. Maggio, 717 F.2d 199, 206 (5th Cir. 1983). (Appendix A, pages 6-7).

Respondent agrees that his trial counsel's use of the Respondent's past record in an attempt to discredit the complainant's identification of Respondent was indeed a trial tactic, albeit an unwise strategic decision. There is no argument with respect to whether this line of questioning was a trial tactic. Instead the thrust of the Respondent's argument and the lower courts' conclusions focuses on how trial counsel subsequently failed to properly limit the use of the evidence to preserve the Respondent's rights. Both the District Court and the Court of Appeals held that the source of ineffectiveness was the Defense Counsel's "failure to object at the proper time to the introduction of Lyons' prior conviction, or to seek to limit the use of such evidence . . ." (Appendix D, page 10). Consequently, the representation by Respondent's trial counsel was, using the words of the Court of Appeals, lacking in competence (Appendix D, page 12).

The Petitioner here has misrepresented the basis for the finding of ineffectiveness. The holding of the District Court and the Court of Appeals is not in conflict with Strickland v. Washington. Consequently, there is no need for the Court to issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

ARGUMENT AND AUTHORITIES

There are no special and important reasons for granting the writ. Both the District Court and the Court of Appeals applied the facts to requirements announced in Strickland v. Washington. In Strickland, the Court required two prongs to be satisfied to justify a reversal of a conviction based upon ineffective assistance of counsel:

1. The defendant must show that counsel's performance was deficient; and
2. The defendant must show that the deficient performance prejudiced the defense.

466 U.S. ____, 104 S.Ct. 2052, 2064 (1984).

Counsel's performance herein was deficient due to his failure to protect Respondent's rights regarding the disclosure of Respondent's past criminal record as heretofore explained. The prosecution cannot utilize a defendant's past criminal record in order to obtain a conviction. The rule in the fifth Circuit is that prior criminal records cannot be used unless the defendant takes the witness stand in his own defense, thereby putting his character in issue. U.S. v. Cisneros, 491 F.2d 1068 (5th Cir. 1974). In such instances a prior record can be introduced for impeachment purposes only. Moreover, in such cases, the jury must be instructed that the evidence might be considered only to the extent it affected the credibility of the defendant as a witness. U.S. v. Walker, 497 F.2d 1050 (5th Cir. 1974).

The Texas Court of Criminal Appeals has discussed the problems inherent in utilizing a defendant's past record:

> an accused's "propensity to commit crimes" is not an issue which is material to whether he is guilty of the specified conduct charged by the State; it follows therefore, that introduction of evidence establishing such a propensity constitutes a trial of the accused as a 'criminal generally' which offends our system of justice. Murphy v. State, 587 S.W.2d 718, 721 (Tex. Crim. App. 1979).

A conviction must be reversed when a defendant has been tried as a criminal generally. Walls v. State, 548 S.W.2d 38 (Tex. Crim. App. 1979).

Trial counsel realized he needed to object when the judge told him he would have to wait until the State posed its questions. Counsel, however, failed object when the occasion arose. He failed furthermore to ask for a limiting instruction. Regarding the ultimate admission of this evidence without either objection or a limiting instruction, Magistrate Sanderson concluded:

> Its admission was extremely prejudicial which became all the more pronounced by the absence of any limiting instruction. Under the circumstances presented, the trial court may have been required sua

sponte to insure that the [Respondent's] Fourteenth Amendment due process rights were protected. e.g. Fitzgerald v. Estelle, 505 F.2d 1334, 1337-1338 (en banc) (5th Cir. 1975).

Herein the trial counsel's representation was clearly deficient.

The second prong in Washington v. Strickland, supra, is whether counsel's deficient performance prejudiced Respondent. Petitioner has not challenged the findings of the courts with respect to prejudice. Considering the totality of the circumstances, prejudice should be found. The witnesses in the Respondent's behalf presented a clear alibi. Moreover, the jury needed two days to reach their decision. Obviously the decision was a close call and not made without debate. In arriving at a decision, the jury was not prevented from treating the Respondent as a criminal generally -- particularly as a criminal who had previously committed the same type of crime in which he was now accused. Finally, the Court of Appeals once again pointed out that the finding of prejudice by the trial court had not been challenged by the State (Appendix D, page 8).

CONCLUSION

For these reasons, Respondent prays that the petition for certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

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